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RE RUMIE MAHLIE, DECEASED

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CRIMINAL REVISION NO: 43-11-2006-II]
22 JUNE 2007

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CRIMINAL PROCEDURE: *Revision - Revisionary powers of High Court Judge - Inquest to determine cause of death - High Court has jurisdiction to revise findings of Magistrate in an inquest where there has been miscarriage of justice - Whether Magistrate was correct in giving an open verdict as to cause* C *of death - Whether High Court can order police to conduct further investigation - Criminal Procedure Code, ss. 339, 341A*

The learned Magistrate had conducted an inquiry into the cause of and the circumstances connected with, the death of Rumie Azzan bin Mahlie (deceased) and had delivered an 'open verdict". The learned Magistrate D could not determine based on the depositions whether his death resulted in any way from any unlawful act or omission on the part of any person. The family of the deceased being not happy with the verdict made this application for revision under s. 341A read with the provisions of Chapter XXXI of the Criminal Procedure Code ('CPC'). The family E wanted the verdict to be revised to say that Rumie never fell to his death from the Window of Operations Room located at the 9th floor of the STA building and that Rumie did not die by committing suicide. They also urged the court to request for the prosecution to conduct further investigations into Rumie's death. The learned judge in this F application raised an issue whether the court had the jurisdiction to hear this revision bearing in mind that this application was by the family of the deceased and not by the learned Senior Federal Counsel.

Held (dismissing the application):

G **(1)** The High Court has the jurisdiction to revise the findings of a Magistrate in an inquest provided that there has been a miscarriage of justice. (para 6)

(2) Considering the evidence before the learned Magistrate, he was correct in not coming into any firm conclusion as to where the H deceased fell from. There was no evidence before the learned Magistrate to conclusively say how the deceased died. Hence the open verdict was the only option available to the learned Magistrate. (para 17)

I **(3)** In respect of the request for the court to direct the police to conduct further investigation, such request is not within the purview of the court. (para 18)

Case(s) referred to:
In Re Anthony Chang Kim Fook, Deceased [2007] 2 CLJ 362 HC ***(refd)***
In Re Loh Kah Kheng [1990] 1 CLJ 823; [1990] 2 CLJ (Rep) 156 HC ***(refd)***
PP v. Shanmugam & Others [2002] 1 LNS 160 HC ***(refd)***
Re Derek Selby Deed, Deceased [1971] 1 LNS 122 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 323, 339, 341A

For the prosecution - Fazillah Begum Abdul Ghani; SFC
For the applicant - Dominique Ng; M/s Dominique Ng & Assoc

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Brief background

[1] The learned Magistrate was directed by the public prosecutor on 6 July 2005 under s. 339 of the CPC, to hold an inquiry into the cause of, and the circumstances connected with, the death of Rumie Azzan B Mahlie (deceased). Learned Magistrate held an inquiry from 24 October 2005 and his terms of reference were to find out:

(1) When did the deceased die?

(2) Where did the deceased die?

(3) How did the deceased die?

(4) In what manner the deceased died?

(5) Whether any person is criminally concerned with the death?

[2] The learned Magistrate delivered his verdict on 6 October 2006 (verdict) which concluded as follows:

> I am therefore of the opinion that the deceased's death occurred between 10.50 - 10.59 am on the 17/9/2004. It occurred on the ground floor of the STA building. The deceased died due to multiple injuries within his body which affect his main internal organs secondary from fall from height. With regard to the manner in which the deceased came to his death, the court cannot determine based on the depositions before it whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any person.

A However, this court will leave it to the police to conduct further investigation, if any.

The learned Magistrate delivered what is called an "open verdict". The family of the deceased was not happy with the verdict and has made an application for revision through their solicitor, Mr. Dominique Ng (Mr. B Ng), under s. 341A read with the provisions of Chapter XXXI of the Criminal Procedure Code ('CPC') for the High Court to examine the record of the inquiry into the death of the deceased for the purpose of satisfying the High Court as to the correctness, legality or propriety of the finding of learned Magistrate recorded in his verdict. In his C submission, Mr. Ng wanted the court to revise the verdict to say as follows:

1. That Rumie never fell to his death from the Window of Operations Room located at the 9th level of the STA building;

D 2. That Rumie did not die by committing suicide.

[3] Mr. Ng also urges the court to request for the prosecution to conduct further investigations into Rumie's death and to reopen the case with another more competent investigation officer.

E **Jurisdiction Of The Court**

[4] At the commencement of this hearing, I asked learned Senior Federal counsel and Mr. Ng whether this court has the jurisdiction to hear this revision bearing in mind that this application is by the family of the deceased and not by the learned Senior Federal counsel. This F issue had been dealt with in the cases of *Re Derek Selby, Deceased* [1971] 1 LNS 122 and *Pendakwa Raya v. Shanmugam & 5 Others* [2002] 1 LNS 160 which held that High Courts do have the jurisdiction to revise any finding of a Magistrate sitting in an inquest proceeding.

G **[5]** I wanted to revisit this principle of law as it may be argued that application for revision can only be done at the request of the prosecution as after all any inquest into a death can only be done through the sanction of the public prosecutor. This is clear from s. 339 Criminal Procedure Code which reads as follows:

H 339. Power of Public Prosecutor to require inquiry to be held.

(1) The Public Prosecutor may at any time direct a Magistrate to hold an inquiry under this Chapter into the cause of, and the circumstances connected with, any death such as is referred to in sections 329 and 334, and the Magistrate to whom such I direction is given shall then proceed to hold an inquiry and shall record his finding as to the cause of death and also as to any of the circumstances connected with it with regard to which the Public Prosecutor may have directed him to make inquiry.

(2) When the proceedings at any inquiry under this Chapter have been closed and it appears to the Public Prosecutor that further investigation is necessary, the Public Prosecutor may direct the Magistrate to reopen the inquiry and to make further investigation, and thereupon the Magistrate shall have full power to reopen the inquiry and make further investigation and thereafter to proceed in the same manner as if the proceedings at the inquiry had not been closed:

Provided that this subsection shall not apply to any inquiry at which a finding of murder or culpable homicide not amounting to murder has been returned against any person.

(3) When giving any direction under this section the Public Prosecutor may also direct whether the body shall or shall not be exhumed.

(4) All directions given under this section shall be complied with by the Magistrate to whom they are addressed without unnecessary delay.

[6] However having reread both the judgments of Sharma J and Suriyadi Halim Omar J in the just quoted cases I wish to state that I agree with their conclusions though reluctantly that the High Court has the jurisdiction to revise the findings of a Magistrate in an inquest provided that there has been a miscarriage of justice. I say reluctantly because in an inquest into death, there is no judgment by the Magistrate as in a trial which has a definitive finding of fault and subject to an appeal. It is only an expression of a non binding opinion of a proceeding where there is no accusation against any party. If of course the Magistrate had erred in his opinion, it is duty bound on the public prosecution to seek redress in court by way of a revision. The family of the deceased is fully entitled to write to the public prosecutor to express their reservations about the verdict and if there are merits, the public prosecutor is then duty bound to seek a revision in court as he is under the Federal Constitution the guardian of public interests. This argument of course was not considered by both Sharma J and Suriyadi Halim Omar J. Be that as it may, I cannot find any cogent reason to limit the plain English meaning of s. 341A (Power to revise) which incorporates the power of revision set out in Chapter XXXI of the Criminal Procedure Code which consists of the following sections:

323. Powers to call for records of subordinate Courts.

(1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.

A (2) Orders made under sections 97 and 98 are not proceedings within the meaning of this section.

[7] I shall now deal with substantive matter of this application.

Should The Findings Of The Magistrate Be Revised?

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[8] To recap, Mr. Ng wants this court to change the learned Magistrate's finding to reflect that the deceased did not commit suicide and did not fall from the 9th floor.

[9] It is opportune now to restate the law on the duty of the learned C Magistrate and this is succinctly stated by Sulong Matjeraie J in the recent case of *In Re Anthony Chang Kim Fook, Deceased* [2007] 2 CLJ 362 at pp. 365-366 as follows:

> Section 337 of the CPC serves as the terms of reference within which the Coroner conducts the Inquest into the death of the deceased. As D such the Coroner cannot act outside the perimeter of the said terms of reference. It must be borne in mind that in an inquest, there are no parties, there is no indictment, there is no prosecution, there is no defence and there is no trial. It is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a E trial where the prosecutor accuses and the accused defends, the Judge holding the balance or the ring, whichever metaphor one chooses to use, see *R v. South London Coroner; ex parte Thompson* [1982] 126 SJ 625 DC.
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> In another English case of *R v. Huntbash; ex parte Lockley* [1944] KB F 606, Viscount Caldecote CJ adds:
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> > ... It is not probability; however which determines verdicts, but proved facts, and, if facts which justify a specific verdict are not proved at an inquest, there is no alternative but to return an open verdict ... .
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> G This is because a Coroner is bound by evidence and can only find facts which are proved in evidence and are not as a result of guesswork which is "certainly out", per Suriyadi J (now JCA) in *Public Prosecutor v. Shanmugam* [2002] 6 MLJ 562.
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> H The function of a Magistrate in holding an inquiry under s. 337 is only to inquire when, where, how and after what manner the deceased came to his death and also whether any person is criminally concerned in the cause of death and without more.

[10] *In Re Loh Kah Kheng (deceased)* Mohamed Dzaiddin J (as he then I was) (1990) stated:

> It must be remembered that the function of a Magistrate holding an inquiry is to inquire when, where and how and after what manner the deceased came by his death and also whether any person is criminally

concerned in the cause of such death (section 337). The cause of death is not defined under section 328 to include not only the apparent cause of death as ascertained by the inspection or post mortem examination of the deceased but all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death and as to whether his death resulted in any way from, or was accelerated by any unlawful act or omission on the part of any person.

[11] The principle distilled from the above cases is clear and that is the learned Magistrate can only make a definite finding based on proved facts produced and not on mere conjectures. So applying that principle of law, I shall now look at the evidences to determine whether or not I should accede to the request of Mr. Ng.

[12] Mr. Ng submitted that there are no evidences to say that the deceased fell from the window of the operations room of level 9 of the STA Building. On this, that is what the learned Magistrate said in his finding at p. 15 which I now reproduce:

In view of the above, I am of the opinion that the deceased had died by falling from height. But the court cannot decide whether he fell from the operation room (on the 9th floor) since the evidence is not conclusive. This is based on the following reasons:

1. The fact that the window in the operation room was open is not conclusive evidence that shows that he jumps from there.

2. The finding of the shoe mark in that room also cannot be said to have indicated that the deceased went into the room and jump through its window. This is because the shoe mark was never sent to the chemist department for testing nor was it ever compared by the I/O to the shoe of the deceased.

3. No finger print was taken by the police on the alleged window where the deceased was alleged to have fallen which is vital to determine whether the deceased fell from that window.

4. No witness testified in the course of this inquest that they did see the deceased went into the operation room during that particular time.

5. The fact that the room was messy is not a strong conclusion that the deceased went in.

[13] From that finding, one can see clearly that the learned Magistrate found no conclusive evidence to say that the deceased fell from level 9 operations room of Wisma STA and as such cannot make any finding. But that does not mean the learned Magistrate was in a position to say that the deceased did not fall from the level 9 operations room as there

A are some evidences but not conclusive enough to say the deceased may have fallen from there. There are also evidences to the effect that no one saw the deceased leaving level 9's main door. Furthermore Dr Ahmad Toha (deponent 7) had testified that the injuries suffered by the deceased could only be from falling from a high place and had ruled out B from the possibility of the deceased falling off from the 2nd or 3rd floor of Wisma STA. With those evidences before the learned Magistrate it is my view that the he was correct in not coming into any firm conclusion as to where the deceased fell from. Hence I find that there is no merit in Mr. Ng's submission on this point.

C **[14]** I come now to Mr. Ng's second request and that is to revise the learned Magistrate's finding to say that the deceased did not commit suicide. On this point Mr. Ng submitted that the deceased's behaviour prior to his death was not consistent to a person who would commit suicide. This is set out at p. 8 of his submission.

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[15] The relevant part of the learned Magistrate's finding is set out earlier in my judgment. One can see from that conclusion that the learned Magistrate handed down an open verdict on the ground that there were no proved evidence to say whether the deceased had committed suicide or died by unlawful means on the part of any person. E

[16] Sharma J in *Re Derek Selby Deceased* [1971] 1 LNS 122 dealt with a situation similar to the present case and this is what the learned judge said:

> F There was no evidence of any plan or desire on the part of Mr. Selby to commit suicide. All that had been proved was that it was not impossible that the deceased had committed suicide. If it could have been shown that he actually had an intention to commit suicide it would be more probable that he in fact did commit it than if he had no such intention. A person may have an opportunity to commit G suicide but that does not mean that he committed it. There was no evidence that the deceased had at any time shown any intention to commit suicide (a man does not always carry his intentions into effect!). If it could be shown that during the week before his death the deceased actually attempted to kill himself and was prevented from doing so, it might have afforded some evidence that he had a tendency H to commit suicide and might have made a second attempt. If, however, the evidence is not sufficient to come to a definite finding as to the cause of death an open verdict should be recorded.
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> In *R v. Huntbash, ex parte Lockley* [1944] KB 606 at p. 608 Viscount Caldecote C.J. said:
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> > Objection is taken to the finding of the coroner on the ground that there was no evidence to support it, and that is the only point in this case. There is no aspersion on or criticism of the

coroner's action, except the criticism to which everyone who sits in a court of justice is exposed, namely that a mistake has been made. It is clear that the coroner sought to discharge his duties with diligence and care, and in accordance with the law.

... I am driven to the conclusion that there was nothing in that evidence on which it could properly be said that there was any evidence of suicide. I am satisfied that, if the coroner had been sitting with a jury and had given a proper direction to them, he would have told them:

Whatever you may guess at, there is no basis of proved fact on which you can return any verdict other than an open verdict.' Section 3 of the Coroners Act, 1887, limits the duties of a jury to acting on evidence which establishes facts and not merely gives rise to surmises.

Sub-section (3) of s. 4 is in these terms: 'After viewing the body and hearing the evidence the jury shall give their verdict and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death.' The words 'so far as such particulars have been proved to them' seem to emphasize the duty of the jury or of the coroner to confine themselves or himself to finding such particulars as have been proved by evidence. *Here the coroner appears to have been attracted by the theory, which remained only a theory to the end of the inquest, that Lockley had deliberately made up his mind to escape for ever from grievances under which he was suffering.*

Passages in his affidavit illustrate how much he was basing his verdict on guesswork instead of on particulars which had been proved in evidence. The conclusions stated in those passages are nothing more than the expression of a theory which is attractive in its probability. It is not probability, however, which determines verdicts, but proved facts, and, if facts which justify a specific verdict are not proved at an inquest, there is no alternative but to return an open verdict ... .

... The coroner will confine himself to establishing facts so far as he can by evidence and then give a verdict which is supported by the facts which have been proved.

The law is that suicide is not to be presumed.

It was for the above reasons that the finding of the learned Magistrate was set aside and his verdict of suicide quashed by me and I substituted an open verdict instead. (emphasis added)

[17] Similarly here, if I were to revise the learned Magistrate's finding to say that the deceased did not commit suicide I would be basing it on mere conjecture. There is no evidence before the learned Magistrate to conclusively say how the deceased died. Furthermore the allegations in P13 (the letter alleging that the deceased was murdered) were tested by the learned Magistrate in details against the evidences produced in court and his conclusion that the allegations were baseless cannot be faulted. Hence the open verdict was the only option available to the learned Magistrate.

[18] Finally in respect of the request for the court to give a direction to the police to conduct further investigation, such request in my view is not within the purview of the court and hence I decline the request.

[19] For reasons stated above, I dismiss this application.